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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 949

JEWELL GABBARD LITTERAL AND LOUIS DYSON,
Petitioners,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE SEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the Seventh Circuit, reported in 300 F. 2d 340. References to (App.) are to the Appendix bound with our Court of Appeals brief of which ten copies have been filed in this Court.

BASIS OF JURISDICTION.

The judgment of the Court of Appeals was entered February 28, 1962. A petition for rehearing was filed but denied on March 30, 1962. Stay of mandate was entered April 4, 1962. The opinion of the Court of Appeals appears in the Appendix to this petition.

Jurisdiction is invoked under Title 28, United States Code, § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. When the law of Illinois makes it clear that a broad construction is to be given to the nature of the use insured, and to fleet coverages in general, is not such binding upon the Federal courts?

2. When the purposes for which the aircraft policy was issued are broadly defined, as to Coverage D, including the "transportation of executives, employees, guests and customers" and including "instruction and rental to others", and "use for personal, pleasure, family and other business purposes", can the insurer by using a restrictive definition of Coverage E (under which recovery is not sought) nullify the protections promised under the preceding insuring agreement?

3. Can the insurer rely upon a defense of nonpayment of premiums when (a) the coverage is a fleet policy, upon a reporting form, with premiums to be determined upon audit; (b) the insurer admitted (App. 6) that the policy of insurance was "in full force and effect"; and (c) the insurer did not plead or prove any defense of nonpayment of premiums?

4. When both the insured, Dyson, and insurance company reported to the State of Illinois that coverage existed upon this aircraft and covered the injuries to the injured

plaintiff, does not such constitute a construction by the parties which is conclusive upon the coverage issue?

5. When active negligence of the airport operator and of his employees was covered by the airport policy, and such negligence would have caused the accident to occur irrespective of who owned the aircraft, does not such coverage remain in effect even though the policy purports to exclude injuries arising from use of aircraft owned by the insured?

STATEMENT OF THE CASE

Upon November 9, 1959, Jean Gabbard Litteral recovered a judgment in the amount of $25,000 against Louis Dyson, doing business as Illini Airport. The findings of facts in that suit, as to which there is no quarrel, showed that upon September 5, 1955, Louis Dyson was doing business as Illini Airport and owned a Globe Swift Model GC-1B airplane, which he was attempting to sell to Robert Schindler (App. 2). Dyson's employees directed Schindler to take off, Mrs. Litteral being a guest occupant of the plane, and a crash occurred. The findings of fact further disclosed (App. 3, 4):

> "that said defendant (Dyson), either by himself or by his agents and servants negligently and carelessly did one or more of the following acts or omitted to do said acts, namely:
>
> "a. Negligently and carelessly directed the pilot of said airplane to take said airplane off the ground and into the air when a cross wind was blowing along the flight strip.
>
> "b. Negligently and carelessly directed the pilot of said airplane to pilot said airplane into the air when it was too close to the outside edge of the flight strip, and so as to create a hazard.
>
> "c. Negligently and carelessly furnished an airplane with a defective propeller or a propeller which

was of a design not suited or proper for installation in said airplane.

"d. Negligently and carelessly operated said airport and operated said airport in violation of the provisions of the Statutes of Illinois and the Civil Aeronautics Regulations, and failed to make an inspection of said airplane as required, and did negligently and carelessly operate said airport with a hazard as is alleged herein, located thereby."

At that time, Dyson had all of his liability insurance with the defendant, Indemnity Insurance Company of North America. One of these policies was an aircraft liability policy AVL 38622, the other policy was an airport liability policy, APL 9941 (App. 9).

Under the aircraft liability policy, the general liability provision, coverage D agreed (App. 23):

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish, including death at any time resulting therefrom, sustained by any person or persons other than passengers as defined herein; *arising out of the ownership, maintenance or use of the aircraft as described in this policy.*" (Italics supplied.)

The "ownership, maintenance or use" of the aircraft is set forth in Item 6 of the declarations (App. 21) and was defined as "commercial"—the broadest category which included the lesser categories and embraced "personal, pleasure, family and other business uses", "instruction and rental to others", "transportation of executives, employees, guests and customers" (App. 21).

Coverage E of that policy dealt with injuries to passengers. Certain aircraft were added by endorsement from time to time to the policy for the specific transportation of passengers, and special premiums were paid for that coverage (App. 12).

The aircraft liability policy, in its basic form (coverage D) was in the amount of $15,000 for injury to each person and covered "all NC licensed aircraft owned, operated, leased or borrowed by the named insured" and expressly provided as follows (App. 24):

"AIRCRAFT LIABILITY REPORTING FORM ENDORSEMENT.

"It is hereby understood and agreed that:

"1. Automatic Attachment and Termination of Coverage:

"The coverages as indicated in the schedule of Coverages of this policy shall apply to all aircraft having an 'NC' certificate issued by the United States Civil Aeronautics Administration owned by the insured at the inception date of this policy and shall automatically apply to any similarly certificated aircraft acquired by the insured as owner during the policy period. This insurance shall terminate with respect to any aircraft disposed of on the date of sale of such aircraft or the surrender of the legal possession thereof by the insured or upon expiration of this policy, whichever may first occur.

"3. Deposit Premium and Rates:

"The deposit premium payable upon inception of this policy is $100.00.

"The rates for this policy are:

Coverages	Rates
D & F	$.14 per day, each aircraft owned or operated.

The airport policy was in the amount of $50,000 for each person and covered (App. 13):

"* * * all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish including death at

any time resulting therefrom, sustained by any person or persons and arising out of the ownership, maintenance or use of the airport premises described in the declarations and all operations which are necessary or incidental to the ownership, maintenance or use of said premises as an airport."

That policy had an exclusion (f) as follows (Abst. 28):

"to bodily injury or death or injury to or destruction of property caused by or arising out of (1) the existence, maintenance or use of any aircraft owned by, hired by or for, or loaned to the insured or any aircraft in flight by or for the account of the insured."

Under the law of Illinois, a report is required to be filed. Under *Illinois Revised Statutes*, Ch. 15½, § 22.42(a, b), a report is required of any accident involving aircraft in this State with a disclosure as to insurance; and if no insurance is in force, the posting of security is required (Appendix to this Petition, p. 35). Pursuant to this statute, a report was filed by the defendant insurance company (Abst. 29) as follows:

INSURANCE COMPANY: Kindly complete this form and return same to
STATE OF ILLINOIS, DEPARTMENT OF AERONAUTICS

CAPITAL AIRPORT
Springfield, Illinois

ACCIDENT NO. #528

With regard to the aircraft liability insurance policy for the policy holder named on the reverse side hereof, the undersigned insurance company advises you in accordance with the items checked below:

☐ 1. No policy was in effect on the date of the accident

☑ 2. Our policy affords bodily injury coverage of not less than $5,000 for 1 person $10,000 for 2 or more ( ) includes passenger liability ☑ ( ) excludes passenger liability ☐

☑ 3. Our policy affords property damage coverage of not less than $5000

Remarks

by Indemnity Insurance Co. of N. A.
Name of Insurance Company

Donald J. Bain
Authorized Representative

Form A 8

A garnishment action was filed by the injured plaintiff and the insured against the insurance company under the two policies previously described. The facts were stipulated and appear in the Appendix filed in the Court of Appeals. The trial court found that the airport policy did not cover, on the basis that the accident arose out of the use of aircraft owned by the insured; and held that the aircraft policy did not cover on the basis that the injury was to a person whose injury arose under coverage E, and that this particular aircraft was not covered under coverage E. The trial court was affirmed upon appeal, its opinion largely being adopted by the reviewing court.

The controversy involved a diversity of citizenship and an amount in controversy in excess of $10,000, thereby presenting a federal question.

SUMMARY OF ARGUMENT.

Where an airport operator purchases two policies from a single insurer—one covering negligence in airport operations, and the other a fleet policy upon all aircraft, he is protected by one or both policies when an injury is received by the guest of a renter or prospective purchaser caused by the negligence of airport employees.

A policy which provides for automatic coverage of all aircraft owned or later acquired by the insured is a fleet policy. Under both general law and Illinois law, it is not necessary that the premium be paid in advance where a deposit has been made and the policy by its terms provides for premium payment subsequent to "audit" at prescribed intervals. In such event, where a broad definition of risks insured is given by the face of the policy, including "guests", "renters", etc., such coverage is conferred by Coverage D. Since recovery is not sought under Coverage E, such proviso cannot be used to limit the liability conferred by Coverage D, by employing a stringent definition of "passenger" applicable to Coverage E. The insurer, by so using a broad definition of the word "passenger" cannot destroy the protection conferred by Coverage D, as defined by the face of the policy—the plaintiff not being a passenger for hire but only a guest occupant of the plane. This is especially true where the parties have demonstrated their practical construction of the contract by certifying to the State of Illinois that coverage was available upon this particular craft and that it extended to this injury.

Likewise, where negligent acts of the insured's employees caused the crash to occur, an exclusion applicable under

the airport policy as to aircraft owned by the insured did not destroy protection against the consequences of such negligent acts under the general liability provisions. This is true since such negligence would have caused the crash to occur irrespective of the condition of the aircraft or of its ownership.

ARGUMENT.

When an airport operator purchases from a single company two policies—one intended to cover liability arising from all airport operations other than caused by aircraft, and the other designed to cover liability resulting from the use of aircraft, he has a right to expect protection under one or the other. It is our conviction that the policy contracts are ambiguous and deceptive; that the insurance company did not even conceive of its policy defense except at a later date; and that the opinion of the Court of Appeals fails to give cognizance to the law of Illinois controlling in this situation.

Under Illinois law, it has repeatedly been stated that in ascertaining the meaning of contractual terms, the courts will look to the interpretation which the parties themselves have placed upon it by their acts, conduct, or statements. *City of Chicago* v. *Chicago City Railway Company*, 245 Ill. App. 473 at 478; *Stetson* v. *Chicago, Aurora & Elgin Railway Company*, 2 Ill. App. 2d 274 at 279, 280, 119 N. E. 2d 395 at 398; *Walters* v. *Walters*, 409 Ill. 298 at 304, 99 N. E. 2d 342. Thus, as stated in *Wager* v. *Robinson Nash Motor Company*, 340 Ill. 81 at 91, 172 N. E. 7 at 11:

> "In the construction of contracts for the purpose of ascertaining the intention of the parties the court will endeavor, by extrinsic evidence of such facts as the parties had in view, to place itself as nearly as possible in their position, so that it may understand the language used in the sense intended by them. (Citations.) In seeking to ascertain the intention, regard will also be had to the practical construction, if any, which the parties by their acts have given the con-

tract. (*Whalen* v. *Stephens*, 193 Ill. 121.) So, also, the acts of the parties themselves indicative of their construction placed upon it may be resorted to for the purpose of determining the true meaning of the written agreement, and in this regard it makes no difference whether such acts are contemporaneous or subsequent."

In fact, it was pointed out in *Colling & Ewing Company* v. *Silver*, 150 Ill. App. 430 at 433, 434:

"There is, however, another well known rule of construction applied to written instruments, viz: that in construing a written contract the court will endeavor to place itself in the position of the contracting parties, and read the instrument in the light of the circumstances surrounding them at the time it was made and of the object which they then evidently had in view, so that the court may understand the language used in the sense intended by the parties using it. (Citations.) *If the intention of the parties to a written contract is sufficiently apparent, effect must be given to it in that sense, though violence be done thereby to its words, for greater regard is to be had to the clear intent of the parties than to any particular words which may have been used in the expression of the intent.* (Citations.)

"'In seeking to ascertain the intention of the parties to a written contract regard will be had to a practical construction if any which the parties by their actions have given to the contract.'" (Italics supplied.)

Louis Dyson filed his report (Plaintiff's Exhibit 8A) describing the accident and showing that such coverage was carried with the Indemnity Insurance Company of

North America. The insurer completed and returned the form to the State of Illinois as follows (App. 29):

INSURANCE COMPANY: Kindly complete this form and return same to
STATE OF ILLINOIS: DEPARTMENT OF AERONAUTICS

CAPITAL AIRPORT
Springfield, Illinois

ACCIDENT NO 7-528

With regard to the aircraft liability insurance policy for the policy holder named on the reverse side hereof, the undersigned insurance company advises you in accordance with the items checked below:

☐ 1. No policy was in effect on the date of the accident.

☑ 2. Our policy affords bodily injury coverage of not less than $5,000 for 1 person $10,000 for 2 or more ☑ includes passenger liability ☐ excludes passenger liability

☑ 3. Our policy affords property damage coverage of not less than $5,000

Remarks

by Indemnity Insurance Co of N. A.
Name of Insurance Company

Donald J. Bain
Authorized Representative

Form A-1

The lower courts became confused and referred to this as creating a contract by operation of the doctrines of "waiver" or "estoppel". Those doctrines are not required here. The furnishing of this report constitutes a practical construction by the parties that coverage was then in force, and effect as to this particular occurrence. The furnishing of these reports has an important public purpose. It is to be certain that financial security exists for airport operators. Had it been certified that there was no insurance protection here, the State would have required it to be furnished for the indemnification of other persons subsequently injured. (See Appendix to this Petition, p. 35.) Indeed there may have been past accidents for which the company certified the existence of insurance so as to preclude past State investigation of the coverage issue. When a report is required by law, and a statement is furnished by an authorized representative of an insurance company and such statement is never withdrawn or modified, and it is relied upon by the public and govern-

mental authorities—then we say such insurer would be estopped thereafter to say that such statement is untrue.

And Illinois has held this to be the proper rule. Lawyers constantly assert that the law tends to become more and more liberal. Yet Illinois has already adhered to such a ruling for almost a century.

In *Alexander v. Barrett*, 46 Ill. 226, a suit was brought to recover damages for the breach of an oral contract to deliver a certain number of barrels of tar, the number being disputed. The court declared, at page 229:

> "He (plaintiff) has proved that, although he understood the contract in a sense much more favorable to himself, the defendants insisted on such a contract as he has alleged, and although it is not a case of estoppel *in pais*, as suggested by counsel, it is one where justice requires the statements of the defendants to be received as satisfactory proof * * *. The defendants cannot complain if they are assessed on a basis furnished by themselves."

A few years later, suit was brought to compel the lessor of certain business premises to maintain them in operation and to reimburse the lessee for his expenses for such repairs. The court, in *Schmohl v. Fiddick*, 34 Ill. App. 190 at 198, stated:

> "So in cases where a party himself places a construction upon a contract and agrees to execute the contract according to such construction, and thereby induces its execution, he will be estopped from afterward repudiating such construction and insisting upon one more favorable to himself. (Citations.)
>
> "When a contract is in any respect doubtful or peculiar, and the parties by their declarations or acts have placed a reasonable construction upon it, such construction will be adopted by the courts, in case of litigation upon it."

A like result followed in *People* v. *Adams*, 65 Ill. App. 283 at 287; and the rules thus early established have become an integral part of Illinois law. We believe that law was binding upon the Court of Appeals and that it had no right to disregard such rules, under *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Now, going to the insurance policies directly, the aircraft policy was a fleet or blanket coverage under which all units owned or acquired by the insured automatically were covered for bodily injury liability. As shown in this particular situation, an advance premium was paid and a certain charge made per day for the protection, the further amounts due being determined by subsequent audit; and it has expressly been admitted here that both policies were in full force and effect (App. 6).

The place where both the District Court and the Court of Appeals became confused was in failing to distinguish between Coverage D and Coverage E. We are not claiming under Coverage E. That is the coverage, however poorly defined, which was set up to take care of the "carrier" situations. Every small airport keeps a couple of planes for carrier use—in this particular instance such being also for ambulance purposes, as shown by the face of the policy which insured not only Dyson but "E. H. Renner Funeral Home, Inc." But the injured plaintiff was not a passenger for hire of the airport, does not claim as such, and is not required to come under the protection of Coverage E.

Coverage D applies to all bodily injuries except the "passenger" situations. As set forth in the policy it covers all personal injuries "sustained by any person or persons other than passengers as defined herein, arising out of the ownership, maintenance or use of the aircraft as described in this policy". The face of the policy defines

the nature of the uses which includes the transportation of executives, employees, guests, customers, instruction, rental, personal, pleasure, family, and business uses (App. 21). Item 6 of the face of the policy makes a specific distinction between those uses and "passenger carrying for which a charge is made" (App. 21):

The defendant insurance company now attempts to contend that no coverage is given under Coverage D wherever any person is injured "while in or boarding the aircraft for the purpose of riding or flying therein, or while alighting from the aircraft after a ride, flight or attempted flight therein". If this is true, then may we ask what protection was given by Coverage D? Here is an aircraft operator, who owns a number of aircraft. A few planes are kept for carrier or ambulance purposes. The rest are used to teach students how to fly, for rental to those already possessing licenses, or for flights by the operator or his employees in connection with the ordinary airport business. For example, an airport employee flies one of the planes into a craft owned by another, or in landing crashes into a barn injuring a student in the plane. A student soloing crashes by reason of defective landing gear. A week-end pilot goes into a stall because of a propeller failure and is injured. One testing a plane to purchase it crashes because of inherent failure of the craft.

Now, certainly, the insured contemplated protection in each of these instances. None of such injured persons is a "passenger" in the "passenger for hire" sense. He is a pilot, or a student, a guest, or an occupant. Is it to be said that the insured shall receive no protection for which he paid under Coverage D, because of the ambiguity of the "passenger" definition in the body of the policy?

The very attempt to contend as the defendant contends here is the thing which has brought insurance into dis-

repute. It is the Amos and Andy type of insurance where: "The big print gives it to you and the little print takes it away." Such cannot be tolerated by courts seeking to give justice to litigants. And Illinois has stated repeatedly that if an insurance policy is susceptible of more than one construction, that construction must be taken which confers protection and permits recovery, rather than one which will deny recovery. 22 *Illinois Law & Practice*, "Insurance," § 149, pp. 195-198 (Appendix to this Petition, p. 36); *Roth* v. *Kaptowsky*, 393 Ill. 484 at 491, 66 N. E. 2d 664. This law the federal courts are bound to follow, but did not do so here. While the ordinary construction of language will be given to an unambiguous contract, clearly the insurer in this situation has created an ambiguity which leaves Coverage D almost meaningless, so far as personal injuries are concerned, if its interpretation of "passenger" is accepted.

Illinois has stated in *Connett* v. *Winget*, 374 Ill. 531 at 535, 30 N. E. 2d 1:

> "The meaning of the word 'passenger' is entirely different from that of the word 'guest'."

And a student pilot has been held not a "passenger" where an aircraft policy is clearly intended to protect the insured against injuries to such persons. *Ohio Casualty Company* v. *Gantt*, 256 Ala. 262, 54 S. 2d 595 at 601.

For years, automobile insurance companies had exclusions in policies—and many still do—against coverage where the automobile is being used for livery purposes, or for the carriage of passengers for a consideration, the language varying widely over a period of years. The courts have gone to great lengths to be sure that business customers, social guests, and even persons riding upon a "share-expense" basis would not be excluded. A few of the many cases to this effect are *Standard Accident Insur-*

ance Company v. *Cloutier*, 92 N. H. 449, 32 A. 2d 684, 147 A. L. R. 626; *Pietrantonio* v. *Travelers Insurance Company*, 282 Mich. 111, 275 N. W. 786, *Beer* v. *Beer*, 134 Ohio St. 271, 16 N. E. 2d 413, 118 A. L. R. 388; *Commercial Credit Corp.* v. *Monroe*, 38 Tenn. App. 596, 277 S. W. 2d 423.

The attempt of the defendant to seek to nullify all protection promised by Coverage D, and by the face of the policy designating the nature of the risks intended to be covered thereunder, is reminiscent of the learned discussion by Lewis Carroll. As was stated in *Through the Looking Glass*:

> "'That's a great deal to make one word mean,' Alice said, in a thoughtful tone.
>
> "'When I make a word do a lot of work like that,' said Humpty-Dumpty, 'I always pay it extra.'"

And the insurer in this instance certainly should pay the word "passenger" extra, because it attempts by its use, under the construction for which it contends, completely to vitiate the insuring agreement. It collects a premium in the first instance for the protection promised to these categories of persons not falling under the "carrier" category—then it collects an additional *premium where* the legal risk is increased by the carriage of passengers for hire. What protection has it given for the basic premium, if protection is afforded to no "occupant" even though falling in a category different from a passenger transported by a carrier?

Manifestly, it is absurd to claim that every occupant of a vehicle, whether it be an airplane or an automobile, is a "passenger". That term has come to have certain legal connotations—namely, where the relationship is other than that of a guest occupant. At least, this is the law of Illinois—and, in this situation, the law of Illinois must control.

Illinois has also repeatedly stated that a broad construction must be given to protect the activities under which liability arises, where "commercial use" or a similar type of coverage is promised by the contract. *Scott* v. *Freeport Casualty Company*, 392 Ill. 332 at 345, 347, 64 N. E. 2d 542; *Wold* v. *Glens Falls Indemnity Company*, 269 Ill. App. 407 at 416. In both of those situations it was pointed out that a narrow construction would not be taken of the purpose of such insurance, but a broader construction which would afford protection to those injured through the ordinary operations of the instrumentalities insured.

When we come to the airport policy, there is more basis for the result reached by the Court of Appeals. Briefly, its reasoning is that the occurrence was one "arising out of the use of aircraft" owned by the insured, and was therefore excluded. However, it is not clear that such a result should necessarily follow.

Briefly, here is the problem. The purpose of such exclusion primarily is to prevent liability from attaching where the injury is caused from the inherent nature of the aircraft—such as a faulty propeller, a disabled engine, or something of that type. Did the injuries "arise out of" the use of the aircraft—or did they "arise out of" the use of the premises? The trial court in the original injury case found as a finding of fact, and such is not disputed here, that there was negligence in the airport operations which caused the injury to occur. Primarily, this was in directing the aircraft to take off a short runway, with a cross-wind, in a direction where high tension wires ran immediately adjacent to the airfield. The wheels snagged the wires, flipping over the plane, and causing the injury to Mrs. Litteral.

The field of insurance law does not clearly indicate that coverage is excluded in such a situation. This is compar-

able to a filling station policy covering premises and vehicles but excluding products liability. A customer orders kerosene. By mistake, a five-gallon jar of gasoline is delivered and, in the course of delivery, is dropped and explodes by reason of static electricity. Even though a products liability policy would cover the loss, and even though the products exclusion would operate once the act of negligence connected with the delivery had ceased, the insured is protected since the negligent dropping of the container was within the policy protection.

This result is sometimes reached even where there is no act of negligence then going on. For example, let us say a heating contractor installs a furnace using butane gas. The policy excludes the hazards of butane gas or liability arising by reason of defects in such appliance or products. The contractor in the course of installation leaves some of the fittings loose, so that they are in a leaky condition. Before he has completed his contract, but perhaps while he is not on the premises (in the instant case, the employee was in the actual act of directing the aircraft along the runway), butane gas escapes and explodes. Would that be covered—in view of the fact that products liability coverage or defective appliances installed by the contractor are not covered? Clearly it would be. *Boutwell v. Employers' Liability Assurance Corp.*, C. A. 5, 175 F. 2d 597 at 600, 601.

Another kindred situation arises where there is both a general liability, or "premises" policy and a vehicle policy, such as upon automobiles or, in this case, aircraft. If a portion of the liability arose out of acts covered under each of such policies, the courts seek to give protection under each policy rather than to deny it under both.

An illustration of such overlapping occurs when a truck policy covers trucking operations including "loading and

unloading", while a second insurer covers premises liability excluding, however, any occurrence arising out of the operation, maintenance, or use of vehicles. A safe is being lowered from a window preparatory to loading it into a truck when the rope breaks; coal is negligently shovelled onto the sidewalk and left in an unlighted pile or the coal chute is left open; or a delivery boy carrying a package from the delivery truck negligently runs into a pedestrian. Now while the results may vary where only one type of policy is carried—where there are both policies in force, one of them at least almost always is held to cover; frequently both are required to share the responsibility pro rata; and in other situations one is made primarily responsible and the other is made liable for any excess liability.

There are in excess of two dozen cases which lay out these rules, with the more modern authority giving a construction to the policy or policies involved so as to extend protection under the circumstances existing. See, by way of illustration, *Bituminous Casualty Corp.* v. *American Fidelity and Casualty Company*, 22 Ill. App. 2d 26, 159 N. E. 2d 7; *Coulter* v. *American Employers' Insurance Company*, 333 Ill. App. 631, 78 N. E. 2d 131; *Woodrich Construction Company* v. *Indemnity Insurance Company of North America*, 252 Minn. 86, 89 N. W. 2d 412 at 419 (holding all three companies concurrently liable); *Lumberman's Mutual Casualty Company* v. *Employers' Liability Assurance Corp.*, C. A. 1, Mass., 252 F. 2d 463 (which held only one insurer liable, although both should have been so held). And, as to acts originating upon premises, see *Moldovan* v. *United States Fidelity & Guaranty Company*, 15 Misc. 2d 85, 184 N. Y. S. 2d 201 at 204, affirmed 185 N. Y. S. 2d 735.

Reasoning from such cases, and from the general principles which apply, we think a fair question may be: "Was

the matter excluded the true cause of the injury?" We think here that it was not. The occurrence would have taken place irrespective of who owned the aircraft in question. If the injury occurred because of the active negligence of the insured's employee in directing the plane into the air, a layman purchasing such insurance would expect to be covered. And this is the test ordinarily applied by the courts in determining whether coverage should be extended or restricted.

CONCLUSION.

It is, therefore, respectfully submitted that a writ of certiorari issue to review the judgment and orders of the Court of Appeals of the Seventh Circuit, heretofore entered in this cause.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

for the Seventh Circuit.

SEPTEMBER TERM, 1961—JANUARY SESSION, 1962

No. 13510

JEWELL GABBARD LITTRALL AND LOUIS DYSON,
Plaintiff-Appellant.

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois.

February 28, 1962

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* This appeal involves a garnishment initiated by Jewell Gabbard Littrall, plaintiff-appellant,[1] who had recovered a judgment in the amount of $25,000.00, as Jewell Gabbard against Louis Dyson, doing business as Illini Airport. The defendant-appellee, Indemnity Insurance Company of North America, had in force two policies of insurance issued to Dyson, one an "Airport Liability Policy," the other an "Aircraft Liability Policy."

1 Referred to herein as garnishor.

The insurance company denied any indebtedness to Dyson, or the possession of any assets or claims due him. The District Court, after a hearing on the merits, filed a memorandum opinion containing its findings of fact and conclusions of law, and entered judgment discharging the garnishee and dismissing the garnishment proceedings. The garnishor appealed.

The findings of fact in the original action against Dyson was introduced in evidence without objection. The third paragraph of the findings of fact states:

> "that on the 5th day of September, 1955, the defendant, Louis Dyson, doing business as Illini Airport, was the owner of and possessed a certain airplane known as a Globe Swift Model C-LB Airplane, Identification Number 80621, which said plane was located at a certain airport known as Illini Airport. ..."

The additional findings of fact disclose that Louis Dyson was the owner and operator of this airport; that he entered into negotiations to sell the Globe Swift aircraft to one Robert Schindler who was assured by Dyson that the aircraft was in good mechanical condition; that there was located near the Illini Airport certain wires and hazards which Dyson knew or should have known that the aircraft with its type of propeller would have difficulty in flying over and clearing the wires; that he directed Schindler to take off, he did and a crash occurred.

The findings of fact further disclose:

> "that said defendant, [Dyson], either by himself or by his agents and servants negligently and carelessly did one or more of the following acts or omitted to do said acts, namely:
>
> "a. Negligently and carelessly directed the pilot of said airplane to take said airplane off the ground and into the air when a cross wind was blowing along the flight strip.

"b. Negligently and carelessly directed the pilot of said airplane to pilot said airplane into the air when it was too close to the outside edge of the flight strip, and so as to create a hazard.

"c. Negligently and carelessly furnished an airplane with a defective propeller or a propeller which was of a design not suited or proper for installation in said airplane.

"d. Negligently and carelessly operated said airport and operated said airport in violation of the provisions of the Statutes of Illinois and the Civil Aeronautics Regulations, and failed to make an inspection of said airport as required, and did negligently and carelessly operate said airport with a hazard as is alleged herein, located thereby."

The findings further disclose that as a proximate result of the defendant's negligent acts the airplane crashed and Mrs. Littrall who was in the plane sustained injuries.

"Item 4" of the Aircraft Liability Policy recites:

"The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto."

Under "Item 5" of the policy, the description of the aircraft is:

"All NC Licensed Aircraft Owned, Operated, Leased or Borrowed by the Named Insured."

Attached to this policy of insurance are "Endorsements" which included the following pertinent clauses:

"Endorsement #1.

"1. Automatic Attachment and Termination of Coverage: The coverages as indicated in the schedule of Coverages of this policy shall apply to all aircraft having an 'NC' certificate issued by the

United States Civil Aeronautics Administration owned by the insured at the inception date of this policy and shall automatically apply to any similarly certificated aircraft acquired by the insured as owner during the policy period. This insurance shall terminate with respect to any aircraft disposed of on the date of sale of such aircraft or the surrender of the legal possession thereof by the insured or upon expiration of this policy, whichever may first occur.

"2. . . .

"3. Deposit Premium and Rates:

. . .

The rates for this policy are:

Coverages	Rates
D & F	$.14 per day, each aircraft owned and operated

Coverage E not provided except as respects the planes described in Endorsement # 2."

"Endorsement # 2.

In consideration of premium to be determined by audit it is agreed that with respect to the following aircraft only:

1. Coverage E, Passenger Bodily Injury Liability is amended to read:

   $20,000.00 each person
   $60,000.00 each occurrence

2. The rate for the above extension shall be $.40 per day owned or operated and shall be applicable only to:

   Navion
   Piper Tri-Pacer
   Piper Tri-Pacer
   Piper PA 22

Endorsements 3, 4, 5, 6, and 7 add and delete other planes but the Globe Swift aircraft involved in the accident was not listed or mentioned on any endorsement.

Coverages D, E and F are listed under the "Insuring Agreements" in the provisions of the policy and read in part as follows:

"Coverage D—Bodily Injury Liability excluding Passengers To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish, including death at any time resulting therefrom, sustained by any person or persons other than passengers as defined herein, arising out of the ownership, maintenance or use of the aircraft as described in this policy."

"Coverage E—Passenger Bodily Injury Liability To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish, including death at any time resulting therefrom, sustained by any passenger or passengers as defined herein, arising out of the ownership, maintenance or use of the aircraft as described in this policy."

"Coverage F—Property Damage Liability" * * *

The "Airport Liability Policy" in its pertinent provisions reads:

"Insuring Agreements"

"Coverage A—Bodily Injury Liability To pay, on behalf of the insured, provided premium is charged under Coverage A in the declarations, all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish including death at any time resulting therefrom, sustained by any person or persons and arising out of the ownership, maintenance or use of the airport premises described in the declarations and all operations which are necessary or incidental to the ownership, maintenance or use of said premises as an airport."

* * *

"Exclusions."

"This policy does not apply:

* * *

"(*f*) to bodily injury or death or injury to or destruction of property caused by or arising out of (1) the existence, maintenance or use of any aircraft owned by, hired by or for, or loaned to the insured or any aircraft in flight by or for the account of the insured * * *."

The Insurer claims it is not liable to pay the judgment because the Globe Swift aircraft was not listed under Endorsement #2 of the aircraft policy and under the airport policy the Globe Swift aircraft was excluded by the exclusion clause which specifically excepted "bodily injury * * * caused by or arising out of the * * * use of any aircraft owned by * * * the insured * * *."

The purpose of construing a contract of insurance is to determine the intention of the parties. The contract of insurance must be construed as a whole. The contract consists of the policy and all endorsements attached thereto. *Morris & Co.* v. *Rhode Island Ins. Co. of Providence*, 1913, 181 Ill. App. 500.

> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense." *Yadro* v. *United States Fidelity & Guaranty Co.*, 1955, 4 Ill. App. 2d 477, 478.

If there is an ambiguity in the contract of insurance it must be construed in favor of the Insured. *Midwest Dairy Products* v. *Ohio Ins. Co.*, 1937, 356 Ill. 389. Since the Insurer is invoking the exclusion clause the burden is upon the Insurer to show that the loss claimed is within the exclusion. *Wilson* v. *National Automobile and Cas. Ins. Co.*,

1959, 22 Ill. App. 2d 34; *Coster v. Motor Ins. Corp.*, 1961, 28 Ill. App. 2d 362.

The aircraft policy, based upon the proof, does not require the insurer to pay this judgment. The policy expressly provides: "Coverage E [which covers passenger bodily injury] not provided except as respects the planes described in Endorsement #2." Endorsement #2 does not describe the Globe Swift aircraft which was involved in the accident. This endorsement required a payment of $.40 per day for each plane so listed. Item 4 of the policy plainly stated "coverages as are indicated by specific premium charge or charges." There is no proof of payment of this charge. There is no ambiguity in the manner in which this coverage is stated. From the language of the contract the parties did not intend to provide coverage for the Globe Swift aircraft, and the Court cannot make a new contract. *Cf. Capps v. National Union Fire Ins. Co.*, 1925, 318 Ill. 350; *W. & S. Indemnity Co. v. Industrial Comm.*, 1937, 366 Ill. 240.

Garnishor contends that the aircraft policy is a fleet policy as evidenced by the clause entitled "Automatic Attachment and Termination of Coverage."

Garnishor further contends that the Globe Swift aircraft is covered by the automatic coverage clause which reads:

> "The coverages as indicated in the schedule of Coverages of this policy shall apply to all aircraft having an 'NC' certificate * * *."

The policy must be read in its entirety. *Konrad v. Hartford Accident & Indemnity Co.*, 1956, 11 Ill. App. 2d 503. The endorsements must be given effect. 22 I. L. P. § 147, p. 191. *Hoffman v. Central Surety & Ins. Corp.*, 1958, 297 Ill. App. 371. The "Coverage E", liability for passenger bodily injury, is limited in Endorsement #2 to those aircraft listed. Other coverage as provided in "D" and "F"

would be effective under the automatic coverage clause. Furthermore, Garnishor's interpretation would also increase the risk without payment of the additional premium provided, $.40 per day.

Counsel for Garnishor also contends that because "Coverage E" refers to passenger bodily injury liability, and since the Garnishor was in fact a guest in the plane she would not come within the exclusion. This argument is completely answered by the definition of passenger in the policy: "The word 'passenger' wherever used in this policy shall mean any person or persons while in * * * the aircraft for the purpose of * * * flight or attempted flight therein."

Garnishor further urges that the Insurer waived the exclusion of those planes not listed because on September 10, 1955, after the accident, the Insurer, through its authorized agent, signed an accident report and filed it with the Secretary of State pursuant to the provision of the Illinois Revised Statutes, 1959, Ch. 15½, § 22.42. In this report it was stated that Dyson had a policy covering liability insurance for the injuries sustained by the crash of the Globe Swift aircraft. The insurance policy number listed in this report was the number of the aircraft policy.

We conclude that since there was no coverage of the Globe Swift aircraft in the policy, this report to the Secretary of State in itself was insufficient to change the terms of the policy and provide additional coverage.

The next question is whether the Airport Liability Policy requires the Insurer to pay the Garnishor's judgment. Here again the policy without ambiguity specifically states:

> "This policy does not apply: * * * to bodily injury * * * caused by or arising out of * * * use of any aircraft owned by * * * the insured or any aircraft in flight by or for the account of the insured."

The Globe Swift aircraft in which the Garnishor was riding was owned by the Insured according to the findings of fact. The exclusion clause in the policy expressly excluded the injuries received by the Garnishor while riding in this aircraft.

Garnishor contends that since the accident was caused by Insured negligently directing Schindler to take off, the use of the plane was not the cause of the accident and the exclusion clause was evaded. This might be true without the words *arising out of* the use of any aircraft owned by the Insured. It must be admitted that "arising out of" is a very broad phrase. *Cf. Schmidt* v. *Utilities Ins. Co.*, 154 ALR 1088, 182 S.W. 2d 181. Although such negligence of the Insured proximately caused the crash and the injuries of the Garnishor it cannot be denied that the accident and injuries arose out of the use of the aircraft. Such construction as urged by the Garnishor is unreasonable and cannot be accepted under the wording of this policy. *Cf. Underwriters at Lloyd's of London* v. *Cordova Airlines*, 9 Cir., 1960, 283 F. 2d 659; *Bruce* v. *Lumbermen's Casualty Co.*, 4 Cir., 1955, 222 F. 2d 642.

In addition to what has been already mentioned the policies read that the Insurer

> "[a]grees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and *subject to* the limits of liability, *exclusions*, conditions and other terms of this policy." (Emphasis supplied.)

The aircraft policy had these additional words "to afford those of the following coverages as specified in the declarations." By this clause the two policies explicitly state the intention of the parties to agree that the insurance afforded was "subject to * * * exclusions." The judgment

was based upon injuries received under circumstances not included within the coverage of the policies. There is no ambiguity which authorizes this court to increase the coverage. *Cf. Employer's Liability Assur. Corp.* v. *Maryland Cas. Co.*, 7 Cir., 1956, 230 F. 2d 370.

We have adopted almost in its entirety the excellent opinion written by District Judge Casper Platt and affirm the order of the District Court discharging the Garnishee and dismissing the garnishment proceedings.

JUDGMENT AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Wednesday, February 28, 1962.

Before

Hon. Elmer J. Schnackenberg, *Circuit Judge*.
Hon. Win G. Knoch, *Circuit Judge*.
Hon. Latham Castle, *Circuit Judge*.

JEWELL GABBARD LITTRALL and LOUIS DYSON,
Plaintiffs-Appellants.

No. 13510

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the District of Eastern Illinois.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court discharging the Garnishee and dismissing the garnishment proceedings in this cause appealed from be, and the same is hereby, AFFIRMED with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Friday, March 30, 1962.

Before

Hon. Elmer J. Schnackenberg, *Circuit Judge*.
Hon. Win G. Knoch, *Circuit Judge*.
Hon. Latham Castle, *Circuit Judge*.

JEWELL GABBARD LITTRALL, ETC., ET AL.,
Plaintiffs-Appellants,

No. 13510

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
Garnishee-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and it is hereby, DENIED.

Statutes Involved.

Illinois Revised Statutes, Ch. 15½, § 22.42a:

"The owner of every aircraft which is in any manner involved in an accident within this State, in which any person is killed or injured or in which damage to the property of any one person, other than to his own property, in excess of $100 is sustained, shall within 10 days after such accident, report the matter in writing to the Department. Such report, the form of which shall be prescribed by the Department, shall contain information to enable the Department to determine whether the requirements for the deposit of security under Section 42-b are inapplicable by reason of the existence of insurance or other exceptions specified in Sections 42-b and 42-c. The owner shall furnish such additional relevant information as the Department shall require."

Illinois Revised Statutes, Ch. 15½, § 22.42b:

"(a) If 20 days after the receipt of an accident report as specified in Section 42-a the Department does not have on file evidence satisfactory to it that the person who would otherwise be required to file security under subsection (b) of this section has been released from liability, or has been finally adjudicated not to be liable or has executed a duly acknowledged written agreement providing for payment of an agreed amount in installments with respect to all claims for injuries or damages resulting from the accident, the Department shall determine the amount of security which shall be sufficient in its judgment to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against each owner.

"(b) The Department shall, within 60 days after the receipt of such accident report, suspend the certificates of registration of each owner of an aircraft in any manner involved in such accident, and if such owner is a nonresident the privilege of the use within the state of any aircraft owned by him, unless such

owner shall deposit security in the sum so determined by the Department; provided notice of such suspension shall be sent by the Department to such owner not less than 10 days prior to the effective date of such suspension and shall state the amount required as security. Where erroneous information is given the Department with respect to the matter set forth in subsection (c) of this section, it shall take appropriate action as hereinbefore provided, within 60 days after receipt by it of correct information with respect to said matters."

Illinois Supreme Court Rule 13(3):

"In pleading the performance of a condition precedent in a contract, it is sufficient to allege generally that the party performed all the conditions on his part; if the allegation be denied, the facts must be alleged in connection with the denial showing wherein there was a failure to perform."

22 Illinois Law and Practice, "Insurance", § 149, pp. 195-8:

"The fundamental law of construction of insurance contracts is that all uncertainty shall be resolved in favor of the insured.

"The general rule, subject to qualifications discussed infra § 150, is that an insurance policy should be construed liberally and most strongly in favor of the insured, to the end that he will not be deprived of the benefit of insurance. The rule of construction to be adopted should be a liberal one favoring the insured, so as not to defeat, without a plain necessity therefor, his claim to indemnity, and if an insurance policy can be given any reasonable construction preventing defeat of insured's indemnification for loss covered by its general language such construction will be adopted.

"In other words, where ambiguity exists in an insurance contract, the courts will adopt a liberal construction of the language used in favor of the insured, and the policy will be construed strictly and strongly against the insurer. The reason underlying this rule

is not the loss of the insured or the disparity between the resources of insured and insurer, but the fact that the words used were chosen by the insurer and that the ambiguity is chargeable to it.

"Since the contract of insurance is written by the insurer, and its provisions are inserted for its benefit, the rule that words of an instrument shall be taken more strongly against the party employing them is applied against insurers."